

State of Colorado



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Meeting Minutes November 15, 2005

The State Personnel Board met in public session on Tuesday, November 15, 2005, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.

The meeting was called to order at approximately 9:15 a.m. Board members Troy Eid, Donald J. Mares, and John Zakhem were present in person. Elizabeth Salkind was present via teleconferencing. Diedra Garcia was absent.

Kristin F. Rozansky, Board Director; Assistant Attorney General Pam Sanchez, Board Counsel; and Jane Sprague, General Professional III, were present in person.

I. REQUESTS FOR RESIDENCY WAIVERS

A. November 1, 2005 Report on Residency Waivers

Director Rozansky reported on two grants of residency waiver requests for this month: a Controller III position for the Department of Health Care Policy and Finance and a Social Sciences Assistant Coordinator (General Professional IV) position for the Department of Natural Resources. She indicated that she included language in the grants that requires the agencies to report to the State Personnel Board within 45 days of filling the positions or in one year from the granting of the residency waiver request.

II. PENDING MATTERS

There were no pending matters before the Board this month.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

There were no Initial Decisions or Other Final Orders of the Administrative Law Judges or the Director on appeal to the Board this month.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

- A. Timothy Bennett v. Department of Corrections, Fort Lyon Correctional Facility, State Personnel Board case number 2005G028.

Director Rozansky recused herself from participation in the discussion and voting of this matter. Board Counsel Sanchez directed the discussion and answered questions about the Preliminary Recommendation of the Administrative Law Judge.

Following a discussion of the meaning of "substantial or motivating factor" and the tension between whistleblowers and the concept of chain of command, Ms. Salkind moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Salkind, and Mr. Zakhem. Mr. Mares voted in opposition to the motion.

- B. Bridget G. Watkins v. Department of Public Health and Environment, Division of Disease Control and Environmental Epidemiology, State Personnel Board case number 2005G078.

Director Rozansky outlined the claims and facts in this matter. Mr. Eid moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Salkind, and Mr. Zakhem. Mr. Mares, the attorney of record, recused himself from this discussion and abstained from voting.

- C. Frederick J. Beall, Gregory J. Bublitz and Gilbert R. Dickman v. Trustees of the Colorado School of Mines, Colorado School of Mines, State Personnel Board case number 2006G020(C).

Director Rozansky outlined the claims and facts in this matter and informed the Board that Respondent had filed a Request for Board Consideration of Jurisdictional Issues. Board Counsel Sanchez discussed the applicable Board rule, 8-51B(A), regarding consideration of filings after the issuance of a preliminary recommendation. Ms. Salkind moved that, pursuant to Board Rule 8-51B(A), Respondent's Request for Board Consideration of Jurisdictional Issues not be accepted for review by the Board. Mr. Mares seconded the motion. The motion passed on the

affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

Mr. Eid then moved to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

D. William J. Kaberlein v. Department of Labor and Employment, Unemployment Insurance, State Personnel Board case number 2005G096.

Director Rozansky outlined the claims and facts in this matter and informed the Board that the Department of Personnel and Administration, not a named party to this litigation, had filed a Motion to Limit the Issue at Hearing or, in the Alternative, to Intervene after the Preliminary Recommendation of the Administrative Law Judge was issued. Board Counsel Sanchez discussed the applicable Board rule, 8-51B(A), regarding consideration of filings after the issuance of a preliminary recommendation. Ms. Sanchez further explained that, if a hearing were granted, the third party in question could raise this issue with the Administrative Law Judge after the case has been set for hearing and the parties to the litigation would also have an opportunity to respond to the motion, which they had not yet done as of the date of the Board meeting.

Ms. Salkind moved that, pursuant to Board Rule B-51B(A), the Department of Personnel and Administration's Motion to Limit the Issue at Hearing or, in the Alternative, to Intervene, not be accepted for review by the Board. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

Mr. Mares then moved that the Preliminary Recommendation of the Administrative Law Judge be adopted, and that the petition for hearing be Granted. Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

E. Lynn Redden v. Department of Labor and Employment, Unemployment Insurance, State Personnel Board case number 2005G094.

Director Rozansky outlined the claims and facts in this matter and informed the Board that the Department of Personnel and Administration, not a named party to this litigation, had filed a Motion to Limit the Issue at Hearing or, in the Alternative, to Intervene after the Preliminary

Recommendation of the Administrative Law Judge was issued. Board Counsel Sanchez discussed the applicable Board rule, 8-51B(A), regarding consideration of filings after the issuance of a preliminary recommendation. Ms. Sanchez further explained that, if a hearing were granted, the third party in question could raise this issue with the Administrative Law Judge after the case has been set for hearing and the parties to the litigation would also have an opportunity to respond to the motion, which they had not yet done as of the date of the Board meeting.

Mr. Eid moved that, pursuant to Board Rule B-51B(A), the Department of Personnel and Administration's Motion to Limit the Issue at Hearing or, in the Alternative, to Intervene, not be accepted for review by the Board. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

The Board also discussed that, in accordance with section 24-4-105(4), C.R.S., and C.R.C.P. 42, the above referenced case should be consolidated with *Kaberlein v. Department of Labor and Employment, Unemployment Insurance*, State Personnel Board case number 2005G096, on the basis that they involve the same series of transactions and common questions of fact and law, which, in the interests of efficiency and judicial economy, should be heard in the same proceeding. Mr. Eid moved that the parties show cause, in writing, why the above referenced case and *Kaberlein v. Department of Labor and Employment, Unemployment Insurance*, State Personnel Board case number 2005G096, should not be consolidated, with responses due to the Administrative Law Judge(s) assigned to the matter. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

Finally, Ms. Salkind moved that the Preliminary Recommendation of the Administrative Law Judge be adopted, and that the petition for hearing be Granted. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

- A. Shelley Burke v. Department of Human Services, State Personnel Board case number 2004B069 (October 24, 2005).

The Board declined to take any action on its own motion in this matter.

VI. REVIEW OF THE MINUTES FROM THE OCTOBER 18, 2005 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

Mr. Mares moved to approve the minutes of the October 18, 2005 meeting as submitted. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Mares, Ms. Salkind, and Mr. Zakhem. Mr. Eid abstained from voting because he was not present at that meeting.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS OCTOBER 18, 2005 PUBLIC MEETING:

- A. David Teigen v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel Board case number 2005G076 (C).

The Board voted to deny Complainant's request for oral argument, to deny Complainant's Petition to the Board to Overturn Administrative Law Judge's Recommended Decision, and to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- B. Mark Schornack v. Department of Human Services, Pueblo Regional Center, State Personnel Board case number 2006G005.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing on the following issues: 1. Did Respondent commit harassment based on gender against Complainant; 2. Did Respondent discriminate against Complainant based on gender in removing him from his Day Program Coordinator position, and did the agency engage in procedural irregularities or violations of law in that removal, thereby demonstrating pretext for intentional discrimination; and 3. In view of the conduct Complainant alleges Weiser engaged in, is Complainant entitled to reinstatement of leave balances taken during stress related leave.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR - Laurie Benallo, Manager, Workforce Planning and Development, Division of Human Resources (DHR), Department of Personnel and Administration (DPA)

Ms. Benallo reported that the audit of the Department of Corrections (DOC) involving layoff cases was progressing, as DHR had finished the records review and conducted interviews. However, William Finger, Attorney at Law, requested that he be allowed to provide additional information on the layoffs. Therefore, DHR is waiting to obtain this additional information, which it will then include in its final report.

Ms. Benallo also reported, on behalf of Jeffrey Schutt, Director, DHR, on two pieces of legislation of interest to the Board: (1) the bill regarding the elimination of the whistleblower investigation by DPA; and (2) the consolidation of appropriations for salary survey and pay for performance. The Board asked that someone from DPA's Executive Office appear at its December meeting to speak further on legislative matters.

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts
- FY 05 Annual Report of Cases under the State Employee Protection (Whistleblower) Act

B. OTHER BOARD BUSINESS

- Staff Activities

In addition to the above referenced matters, Ms. Rozansky also gave an update on the status of the Continuing Legal Education (CLE) program, which is scheduled for presentation by Board staff on December 16, 2005. The program, to be held at Holland & Hart, provides for 5 General and 1 Ethics Credit, and will cost \$25.00. This program is designed for anyone currently practicing before the Board. Invitations to attend the CLE were sent to attorneys currently practicing before the Board, as well as HR administrators throughout the state.

In addition, Ms. Rozansky provided to the Board a copy of a letter she received from Patricia Cookson, Attorney at Law, regarding the excellent service she has received from Board staff, especially Andrea Woods, Program Assistant.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. PROPOSED LEGISLATION AND/OR RULEMAKING

Director Rozansky reported that the layoff rules review committee had had an initial meeting, with the following persons in attendance: Director Rozansky and Jane Sprague from the State Personnel Board; Pam Sanchez, Board Counsel; Stacy Worthington, from the Attorney General's Office; Miller Hudson, Executive Director, Colorado Association of Public Employees (CAPE); Michael Belo, CAPE Counsel; and Mark Schwane, Executive Director, American Federation of State, County, and Municipal Employees (AFSCME). Jo Romero, Executive

Director of Colorado Federation of Public Employees (CFPE), was unable to attend, but provided comments to the group as to the concerns of CFPE.

The initial discussion centered around the question of whether there was a need to review the Chapter 7 Board Rules and why. There were several issues articulated by the attendees and CFPE, including the 50-mile rule, retention areas, and the definition of "layoff." It is anticipated that the committee will be expanded to include a person from Human Resources (HR), an appointing authority, someone from the Governor's Office of Legal Counsel, and the HR Network will also be involved. Mr. Zakhem commented that Referendum C passed and no massive layoffs were anticipated by the state and that a decision from the Court of Appeals on the *Clementi* case may impact the future of the layoff rules.

XI. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the October 18, 2005 Executive Session
- C. Other Business

The meeting adjourned by consensus.

APPROVED THIS 20th DAY OF DECEMBER, 2005.

John Zakhem, Chair

Troy Eid, Member

Donald J. Mares, Member

Elizabeth Salkind, Member